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**IN THE SUPREME COURT OF THE UNITED STATES**

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**October Term, 1970**

**No. 70-73**

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**MARVIN MILLER,**

*Petitioner,*

**vs.**

**THE PEOPLE OF THE STATE OF CALIFORNIA,**

*Respondent.*

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**PETITION FOR REHEARING**

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*To the Honorable Presiding Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

This is a petition for rehearing from the order and decision of this Court, dated June 21, 1973, vacating and remanding the judgment of the Superior Court for the County of Orange.

## **REASONS FOR GRANTING A PETITION FOR REHEARING**

### **I**

DEVELOPMENTS IN THE CALIFORNIA COURTS SUBSEQUENT TO JUNE 21, 1973, ILLUSTRATE THAT THE MAJORITY OPINION OF THIS COURT, ON ITS FACE, AND BOTH IN THE SUBSTANTIVE AND PROCEDURAL ASPECTS THEREOF, CANNOT BE UNDERSTOOD, NOR APPLIED, AND IS SO VAGUE THAT PERSONS OF COMMON INTELLIGENCE ARE NOT AWARE OF WHAT ASPECTS OF FREE SPEECH, PRIVACY AND LIBERTY ARE PROTECTED AGAINST GOVERNMENTAL INTRUSION BY THE FIRST, FOURTH, FIFTH, NINTH, TENTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

### **II**

FOR THE REASONS SET FORTH IN THE BRIEFS OF AMICUS CURIAE AND THE BRIEFS OF COUNSEL IN COMPANION CASES ON PETITION FOR REHEARING, ALL OF WHICH ARE ADOPTED HEREIN AS THOUGH FULLY SET FORTH AT LENGTH, THE REHEARING SHOULD BE GRANTED, IN THE INSTANT CASE, AND THE JUDGMENT OF CONVICTION SET ASIDE.

### **III**

FOR THE REASONS SET FORTH IN THE DISSENTING OPINION OF THIS HONORABLE COURT, THE REHEARING SHOULD BE GRANTED AND THE CONVICTION SET ASIDE.

### **IV**

THE PROSECUTION WAS ESTOPPED FROM PROCEEDING

AGAINST DEFENDANT AND PETITIONER HEREIN, AND THE RECORD AFFIRMATIVELY DEMONSTRATES THAT ISSUES HAD BEEN PRESENTED TO THE TRIAL AND APPELLATE COURTS BELOW.

## ARGUMENT

### I

**Developments Subsequent To This Court's Decision On June 21, 1973, In California Alone, Demonstrate That The Majority Opinion Cannot Be Understood, Much Less Applied.**

Petitioner submits that although in California the Penal Code sections dealing with obscenity have been unconstitutional by the majority in this case, the California courts—including the California Supreme Court—have taken the following positions:

1. Declared the Statute unconstitutional (Los Angeles Superior Court, *People v. Bloom*, Case No. A282,816, the Honorable Judge Dell, July 10, 1973).

2. Declared the Statute *constitutional* (Los Angeles Municipal Court Case Nos. M31448274 and M31448275, *People v. Jaime Silva, et al.*, and *People v. James N. Hill, et al.*, respectively, Honorable Michael T. Sauer, Judge Presiding). (See Habeas Corpus Criminal No. 17031 [annexed hereto as an appendix]; Beverly Hills Municipal Court Case Nos. M34540, M34539, *People v. Miranda*, the Honorable Leonard Wolf, Judge Presiding, July 11, 1973.)

3. Refused to pass on the issue or to "authoritatively

construe" the Statute (*In re Jaime Silva, etc., et al.*, California Supreme Court, Habeas Corpus Criminal No. 17031, Petition for Writ of Habeas Corpus denied, July 12, 1973).

In the latter case, the California Supreme Court declined to "authoritatively construe" the Statute, even though the aforescribed lower California courts have taken the contrary positions that the Statute had and had not been "authoritatively construed" by the California Supreme Court. This Court's attention is directed to the contradictory cases of *People v. Noroff*, 67 Cal. 2d 791 (1967), and *In re Panchot*, 70 C. 2d 105 (1968), both decided by the California Supreme Court, which are contradictory insofar as the majority opinion is concerned, this case dealing with "that particular subject of authoritative construction" and "specific" description of matter which is to be suppressed.

As indicated, a copy of the Petition for a Writ of Habeas Corpus, filed with the California Supreme Court, above described, is attached hereto, and its contents, allegations and authorities in support thereof are incorporated herein as though fully set forth at length.

In sum, the Court of Last Resort in the State of California has refused to authoritatively construe its own Penal Statute, even though that instruction is mandated by this Court.

## II

**The Prosecution Of The Instant Case Was Estopped Under The Doctrine Of *Ashe v. Swenson*, 397 U.S. 436 (1969), And *Waller v. Florida*, 397 U.S. 387 (1970).**

This Court indicated in its footnote that the record

did not sustain the challenge of prior judicial determination of the "non-obscurity" of the materials herein prosecuted. Counsel believes that the Court overlooked the plain fact that the prior decision and order of Judge Arguelles was presented to the trial court before trial, on a Motion to Dismiss, and the argument of "estoppel" was presented to the Orange County Superior Court, Appellate Department (see Clerk's Transcript, pp. 17-21).

### CONCLUSION

The undersigned counsel argued to this Court, on oral argument, that whether National or Local standards were to be declared by this Court as "constitutional," the courts below, as usual, would fail to abide by this Court's decision and, rather, would heed their respective viscera. The prophesy is fulfilled, and Job's lament is recalled (3, 25):

"For the thing which I greatly feared has come upon me, and that which I was afraid of is come unto me."

Respectfully submitted,

BURTON MARKS of

MARKS, SHERMAN & SCHWARTZ

*Attorney for Petitioner*

**CERTIFICATE OF COUNSEL**

The undersigned counsel, being a member of the bar of this Court, certifies that this Petition for Rehearing is presented in good faith and is not for the purpose of delay.

.....  
**BURTON MARKS**

## APPENDIX

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### PETITION FOR WRIT OF HABEAS CORPUS HC CRIM. 17031

In the Supreme Court of the State of California.

Case Below: LAMC Nos. 31448274, 31448275.

In the matter of the Application of BURTON MARKS,  
Petitioner, On Behalf of, JAIME SILVA, CELIA IBARRA  
SANTOS, LUIS IBARRA LEPE, FONTY WAYNE FLACK,  
JAMES NORMAN HILL, CANDY CYNTHIA KILBY,  
STEVEN WILLIAM LEACH, ARBEN NEAL WITT.

*To the Honorable Presiding Justice and Associate  
Justices of the Supreme Court of the State of California:*

Your Petitioner respectfully alleges as follows:

1. That your Petitioner is the attorney for the prisoners, SILVA, SANTOS, LEPE, FLACK, HILL, KILBY, LEACH, and WITT, for whom this Petition has been filed.
2. That each of the said prisoners are being illegally held, in the constructive custody, confinement or restraint of Peter J. Pitchess, Sheriff for the County of Los Angeles at Los Angeles, in the County of Los Angeles.
3. That criminal complaints, nos. 31448274 and 31448275, were filed in the Municipal Court of the Los Angeles Judicial District, charging all prisoners with violations of Penal Code § 311.2.<sup>1</sup> Each of the prisoners were arrested after the issuance of arrest warrants on the said complaints, and were arraigned in Division 80, of the Los Angeles Municipal Court on June 27, 1973.

<sup>1</sup> Both complaints involve the same incidents; all defendants being employees of the same film processing corporation. The decision to divide the defendants into two groups appears to have originated in the City Attorney's office.

4. On said date and in said Division, Motions were made on behalf of each prisoner/defendant to dismiss the complaints on the grounds that the statute, § 311.2, was unconstitutional in light of *Miller v. California*, 13 CRL, 3161 (decided June 20, 1973).

5. The Motions to Dismiss were denied and upon their plea of not guilty, Defendants were ordered to appear for trial in Division 40, Los Angeles Municipal Court, on July 19, 1973. All Defendants are at liberty on bond.

6. That the arrest, detention and confinement and restraint of the Defendants is illegal and unlawful in that each are being prosecuted under a statute which is unconstitutional and void, in violation of Amendments I and XIV of the United States Constitution, in that said statute, Penal Code § 311.2 fails to specifically define that sexual conduct which, if depicted or described in a patently offensive manner, constitutes a crime, in the State of California; and that further, said statute has not been so construed, authoritatively, by this Honorable Court.

7. That no other application for a Writ of Habeas Corpus or a warrant in lieu thereof has been made, by or on behalf of said persons in regard to said restraint.

WHEREFORE your Petitioner prays that a Writ of Habeas Corpus be issued, directed to the Honorable Peter J. Pitchess, Sheriff for the County of Los Angeles, commanding him to have said prisoners before this Court, at a time and place therein to be specified, to do and receive what shall then and there be considered by this Court, concerning the persons so restrained.

Petitioner further prays that pending hearing on this Petition for Writ of Habeas Corpus, that a Stay Order issue

out, and under the Seal of this Court, staying further criminal proceedings in the Los Angeles Municipal Court case Nos. 31448274 and 31448275.

DATED: June 28, 1973.

BURTON MARKS

### Verification

State of California            )  
County of Los Angeles        ) ss.

I am the Petitioner in the above entitled action; I have read the foregoing PETITION FOR WRIT OF HABEAS CORPUS and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 28, 1973, at Beverly Hills, California.

BURTON MARKS

### Points and Authorities

This is a Writ of Habeas Corpus invoking the original jurisdiction of this Court, on Habeas Corpus (California

Constitution, Article VI, § 10) to declare § 311 and § 311.2 of the California Constitution, unconstitutional and void in violation of Amendments I and XIV to the United States Constitution in that said statutes do not meet the First Amendment standards of specificity set forth in *Miller v. California*, 13 CrL 3161 and the related cases all decided on June 20, 1973, by the United States Supreme Court. (*Paris Adult Theatres v. Slaton*, 13 CrL 3171; *U. S. v. Orito*, 13 CrL 3192; *Kaplan v. California*, 13 CrL 3194; *U. S. v. 12,000 200-Ft. Reels of Super 8MM Film*, 13 CrL 3197).

This Petition for Writ of Habeas Corpus is brought, in addition, under the authority of *Ramirez v. Brown*, 9 C.3d 199, in that it is a case which, "poses a question which is of broad public interest, is likely to recur and should receive uniform resolution throughout the state" (9 C.3d 203).

In the interpretation and construction of California statutes, the California Supreme Court has final authority, and the United States Supreme Court will accept the determination of the California Supreme Court. *Quong Ham Wah Co. v. Ind. Acc. Com.*, 255 U.S. 445 (1921).

*Miller v. California, supra*, and *U. S. v. 12,000 200-Ft. Reels, supra*, (footnote 7), have mandated, review by this Court to determine whether or not the California legislative definition of "obscenity" can be reasonably construed to include only as regulating material, "to patently offensive representations or descriptions of . . . 'hardcore' sexual conduct . . . ."

In the alternative, the United States Supreme Court has mandated that this Court declare whether such a construction has heretofore been placed upon the statutes so

as to assure that there has been a careful limitation in the regulation of obscene materials limited to regulation of works which depict or describe specifically defined sexual conduct.

Parenthetically, it is submitted that this Court must also determine whether or not §§ 311 *et seq.* of the California Penal Code are limited to "works which, taken as a whole, appeal to the purient interest in sex, which portrays sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value". *Miller* at 3163. (Query: Why did the majority leave out "educational"? Taking the first letters of the words "literary", "artistic", "political" and "scientific", we get "LAPS". If "educational" were added, we would get "LAPSE", which might more accurately describe the majority opinion.)

It is submitted that the definition of "obscene" under § 311(a) of the California Penal Code is constitutionally deficient and cannot be cured by construing the statute to mean certain types of specific sexual conduct. Mr. Justice Burger gave us two examples of types of Penal statutes regulating "obscenity" which would be constitutionally sufficient (*Miller* at 3164):

- (a) Patently offensive representations or descriptions of ultimate sexual act, normal or perverted, actual or simulated.
- (b) Patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals.

Arguably, under this Court's decision in *Noroff*, 67 C.2d 791 (1967), construction (a) might be deemed accept-

able. However, compare *Noroff* with *In re Panchot*, 70 C.2d 105 (1968), and we find that the portion of "lewd exhibition of the genitals" has been specifically held by this Court to *not* be included within the definition of "obscene" in the State of California. The closest that this Court has come to the Burger definition is to describe obscene to include only "graphic depictions" of sexual conduct (*Noroff*) . . . certainly not "specific" as required in *Miller* and the companion cases.

The ultimate conclusion therefore, is that insofar as Penal Code § 311(a) defines "obscenity" in the standard "*Roth*" manner, that its constitutional deficiencies cannot be cured by a judicial "construction" which defines certain types of sexual conduct as being prohibited.

Obviously, this type of judicial "construction" would in effect be "judicial legislation" trying to anticipate that sexual conduct which the legislature does not want depicted. This Court, itself, has stated that it cannot engage in judicial legislation. A statute cannot be rewritten wholesale, in order to make it constitutional. See *People v. Stevenson*, 58 C.2d 794, 798 (1962).

Finally, since the arrest of the prisoners was made prior to the pronouncements of June 20, 1973, as to First Amendment requirements for specificity of state statutes, any construction of the statute which would hold the instant Defendants liable for violation of the statute, would necessarily be *Ex Post Facto* and "constitutionally inappropriate". U. S. Constitution, Article I, § 9, § 10; California Constitution, Article I, § 16.

### Conclusion

The effect of the recent Supreme Court decisions has been to render the California Obscenity Statutes unconstitutional and void, in violation of Amendments I and XIV to the United States Constitution. They cannot be revitalized by any sort of judicial construction, since this type of judicial legislation could only serve to further cloud the issue, rather than being more specific.

This Petition for Writ of Habeas Corpus should be granted, and the prisoners ordered discharged from custody.

Respectfully submitted,

MARKS, SHERMAN & SCHWARTZ

By BURTON MARKS

[Declaration of service annexed showing service on June 29, 1973, of the within document, as follows:

PETER J. PITCHESS  
Sheriff, Los Angeles County  
Hall of Justice  
211 West Temple Street  
Los Angeles, California 90012

Attorney General  
State Building  
Los Angeles, California 90012

CITY ATTORNEY  
205 South Broadway  
Los Angeles, California 90012  
Attention: Appellate Division

Los Angeles Municipal Court  
Criminal Clerk.  
210 West Temple Street  
\*Los Angeles, California 90012.]

STATE OF CALIFORNIA           )  
  ) ss.  
County of Orange               )

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding, that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on JULY 15, 1973, I served the within PETITION FOR REHEARING (Supreme Court No. 70-73) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

ATTORNEY GENERAL  
STATE OF CALIFORNIA  
600 State Building  
Los Angeles, California 90012  
(3 copies)

SOLICITOR GENERAL OF  
THE UNITED STATES  
U. S. Department of Justice  
Washington, D. C. 20530  
(3 copies)

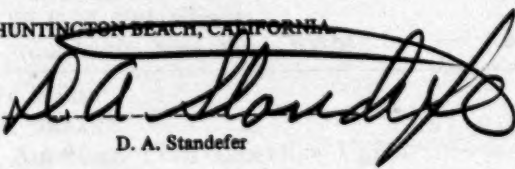
DISTRICT ATTORNEY  
COUNTY OF ORANGE  
700 Civic Center Drive West  
Santa Ana, California 92701  
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APPELLATE DEPARTMENT  
SUPERIOR COURT  
700 Civic Center Drive West  
Santa Ana, California 92701  
(1 copy)

MUNICIPAL COURT - HARBOR JUDICIAL DISTRICT  
567 West 18th Street  
Costa Mesa, California 92626  
(1 copy)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JULY 15, 1973, at HUNTINGTON BEACH, CALIFORNIA.

  
D. A. Standefer

Dean-Standefer Co., 326½ Main St., Huntington Beach, Ca.  
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